Supreme Court of the United States

OCTOBER TERM, 1951.

No. 382.

AMBROSE P. McCOY ET AL.,
Petitioners,

v.

PROVIDENCE JOURNAL COMPANY ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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[illegible], 1951.

[illegible] PRINTING CO., PROV., R. I.

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BRIEF FOR RESPONDENTS, PROVIDENCE JOURNAL COMPANY, SEVELLON BROWN AND JOSEPH A. KELLY, IN OPPOSITION.

Opinions Below.

The opinion of the United States District Court for the District of Rhode Island is reported in 94 F. Supp. 186 (Record, pp. 50-70). The opinion of the United States Court of Appeals for the First Circuit, affirming the judgment of the District Court, is reported in 190 F. (2d) 760 (Record, pp. 650-659).

Ground of Jurisdiction Claimed by Petitioners.

The jurisdiction of this Court is invoked by the petitioners under 28 U.S.C. sec. 1254 (1), the statute governing applications for writs of certiorari.

Questions Presented by Petitioners and Summary of Respondents' Points.

The questions presented by the petitioners' application (see page 2 of their brief in support of their application) may properly be summarized, along with the respondents' answers thereto, as follows:

1. Did the District Court and the Court of Appeals both err in holding that the records here involved (tax abatement records of the City of Pawtucket, Rhode Island) were public records to which respondents had the right of access? Moreover, is the issue as to the public nature of these records sufficiently "special and important" to justify the granting of the present application (Supreme Court Rule 38, sub-sec. 5)? It is our position in opposing the petitioners' application (*a*) that these records were admitted to be public records by the petitioners at the trial, (*b*) that at common law they are public records to which persons in the position of these respondents have the right of access, and (*c*) that they are public records to which respondents have the right of access, by an express decision of a Rhode Island Court (which decision was followed in the case at bar by both the District Court and the Court of Appeals). The issue on this point is so clear, we submit, both as a matter of fact and as a matter of law, that the application on this ground appears to be entirely devoid of merit.

2. Did both of the lower Courts err in holding that the respondents (the original plaintiffs) were denied the equal

protection of the laws (Art. XIV, sec. 1, of the Amendments to the Constitution; U.S.C. Title 8, sec. 43; U.S.C. Title 28, sec. 1343 (3))? It is our position that the determination of this question, which in the petitioners' brief is set up as a separate issue, is really governed by the determination of the issue stated in the preceding paragraph. If these records were public records, then the constitutional violation and the violation of the Civil Rights Act follow as a matter of course. Moreover, as with the first question, there is nothing here to move this Court to grant certiorari.

3. Is there any error involved in the record, such as to move this Court to grant certiorari, on the claim of the present petitioners that the complaint was unduly prolix? This contention was held by the District Court at the conclusion of the trial to be without merit. It was similarly held by the Court of Appeals to have no merit, even though the Court of Appeals was, as a matter of dictum, critical of the form of the complaint. On this state of the record we submit that this is a trivial and frivolous ground on which to ask this Court to grant certiorari.

Statement.

The two extensive opinions in the Courts below give a full and accurate summary of the facts in the case at bar.

The case involves on the one hand a Rhode Island newspaper with a large circulation, the Providence Journal, and its editor and a branch office manager, Sevellon Brown and Joseph A. Kelly; and on the other the Mayor, Treasurer and various other officials of the City of Pawtucket.

The issue presented in the complaint was whether these officials could, according to their own arbitrary whim, withhold from the Providence Journal and its representatives

certain important tax records of the City of Pawtucket (a city of some 77,000 people—Kelly's testimony, Record, pp. 78-79), while at the same time granting access to those records to other persons, including a local Pawtucket newspaper, the Pawtucket Times (Record, pp. 2-19; Opinion of the District Court, Record, pp. 50-56, *et passim*, 94 F. Supp. 186, 187-190; Opinion of the Court of Appeals, Record, pp. 650-653, 190 F. (2d) 760, 761-763). The further issue presented by the complaint was whether such arbitrary and capricious action deprived the Providence Journal and its representatives of its rights under the "equal protection" clause of the XIV Amendment and accordingly its rights under U.S.C. Title 8, sec. 43 (Complaint, Record, pp. 15-16; Opinion of the District Court, Record, pp. 53-54, 65-68, 94 F. Supp. 186, 189, 193-196; Opinion of the Court of Appeals, Record, pp. 654-658, 190 F. (2d) 760, 763-766).

The tax records in question were records of tax abatements granted to persons and corporations in the City of Pawtucket by the bi-cameral City legislature, the City Council (composed of a Board of Aldermen and a Common Council). These abatements were substantial in amount. They involved $89,377.12 in the resolution passed 31 December, 1947 (Record, Opinion of the District Court, pp. 55-56). The amounts for the previous years were as follows:

Date	*Amount*
December 31, 1942	$ 20,081.42
December 31, 1943	$111,416.14
December 31, 1945	$142,172.89
February 12, 1947	$107,205.44

(Record, Opinion of the District Court, p. 56, 94 F. Supp. 186, 190; Menihan's testimony, Record, p. 356; Exhibit 14, Record, p. 357.)

The Journal and its representatives sought to obtain the lists of these very substantial tax abatements from the City officials. Informal and formal requests were all rebuffed. The District Court's findings are very full in this regard (Opinion of the District Court, Record, pp. 57-61, 94 F. Supp. 186, 190-192). The Court of Appeals held (Record, pp. 653-654, 190 F. (2d) 760, 763):

> ". . . They have given access to those records to the Pawtucket Times, but denied like access to its competitor the Providence Journal. To be sure, the denial is not direct and categorical, but it is none the less effective. Postponement, evasion and rebuff by the city officials are as effective as outright refusal, and application by the Providence Journal, or its officers or agents, to the City Council pursuant to local legislation for permission to see the records would clearly accomplish nothing, for the District Court found on such abundant evidence as to make challenge futile that the discrimination practiced by the defendants against the Providence Journal was 'wilful,' 'purposeful,' 'arbitrary,' and 'capricious,' and that the only reasonable conclusion to be drawn from the record as a whole was that the enactments of the City Council were but 'the crowning achievement' of the discrimination which it had found to exist.
>
> "Thus the substance of the plaintiffs' case, omitting their contention with respect to freedom of the press which in our view it is not necessary to consider, is that they have the right under the law of Rhode Island to inspect and to publicize the fiscal records of the city of Pawtucket, and that the officials of that city, at first without statutory authority but later under color of city ordinances, have denied them that right while conferring it upon others whose circumstances were similar to their own.

> "We are confronted, therefore, with an issue of equal protection of the laws, and in keeping with accepted judicial practice we shall confine ourselves to that issue, passing the broader issue of freedom of the press, for in our opinion the case can be disposed of on the narrower issue."

After the dispute was under way, the Pawtucket City Council passed an ordinance that forbade anyone to inspect the records except with the consent of the City Council and later passed two resolutions, one of which expressly gave the locally competing newspaper, the Pawtucket Times, the right to inspect these tax abatement records (Opinion of the District Court, Record, pp. 59-61, 94 F. Supp. 186, 191-192). These pieces of legislation are dealt with fully in the two opinions below.

The statement of facts in the petitioners' application requires comment in two incidental respects. It purports to copy the opinion of the Court of Appeals in so far as it dealt with the facts, but it omits the explanatory first paragraph which summarizes the case. This paragraph reads as follows (Record, p. 650, 190 F. (2d) 760, 761):

> "This is an appeal from a final judgment permanently enjoining the City Treasurer, who is also the Tax Collector, of Pawtucket, Rhode Island, 'and all persons acting under or in concert with him,' from withholding certain municipal tax abatement resolutions and lists from the plaintiffs, and from preventing them from inspecting those resolutions and lists 'at all reasonable times during regular business hours.'"

In the second place, petitioners' statement says in reference to the opinion of the Court of Appeals (p. 3 of their

brief): "The opinion . . . contains the following quoted statement of the circumstances of the case. . . ." This seems to imply that the Court of Appeals took over the lower Court's opinion and incorporated it in its own opinion. This is not so. The Court of Appeals in affirming the District Court made its own findings and wrote a detailed opinion of its own (*cf.* Record, pp. 650-653, 190 F. (2d) 760, 761-764, and Record, pp. 54-63, 94 F. Supp. 186, 189-193).

Argument.

I. The Petitioners' Contention that These Records are Not Public Records to which Respondents have the Right of Access Furnishes No Basis for the Granting of a Writ of Certiorari in This Case and is in Any Event Entirely Unsound.

The petitioners contend that the tax abatement records which are the subject of the dispute here are not, under the laws of Rhode Island, public records to which respondents have the right of access. They contend that the two lower Courts erred in holding that they were. They contend further that the two lower Courts should in some way have been bound by an earlier Rhode Island decision (*In re Caswell,* 18 R.I. 835) and should not have followed a later Superior Court decision which was exactly in point and which had to do with these very records.

Even if these contentions constituted any basis for the exercise of this Court's jurisdiction in granting certiorari (which it seems to us clearly they do not), they are completely unsound.

a. The testimony at the trial shows that the petitioners admitted that these records are public records.

The position of the Pawtucket city officials seems to have undergone many changes on this point. At the trial the defendant McCoy (the then Mayor of Pawtucket) and the defendant Henderson, the majority leader of the Board of Aldermen and the only member of the bar among the defendants, both took the position that these records were public records (McCoy's testimony, Record, p. 203; Henderson's testimony, Record, pp. 498-499). To the same effect is the testimony of two other defendants, a chairman and a member of the Board of Tax Assessors (Garvey's testimony, Record, p. 376; Murphy's testimony, Record, p. 414). The Deputy City Treasurer Menihan, who is not a defendant, also took the same view (Menihan's testimony, Record, pp. 366-369). The defendant Henderson was very explicit in what he said (Henderson's testimony, Record, p. 498):

> ". . . But, I do still feel that tax abatement is a public record. I think it should be if it isn't. . . . I say, frankly, that in my opinion the tax abatement record should be a public record. . . ."

The District Court made a finding in general as to public records of this sort apart from these particular records which were withheld (Record, pp. 56-57, 94 F. Supp. 186, 190):

> "The public records of the City of Pawtucket used in the transaction of municipal affairs and the records pertaining to matters of public interest and concern are, in general, open to general inspection by any member of the public (including newspaper reporters) at all reasonable times on business days and during regular business hours."

Thus by the time the trial had ended there was little doubt that one issue had apparently been settled, namely, that these records were public records.

b. At common law these records are public records to which persons in the position of these respondents have the right of access.

As a matter of general law, we need hardly labor the point that it would be extraordinary if such a fundamental record of municipal finance as a tax abatement list were not a public record to which the public has the right of access. On the general question see—

Nowack v. *Fuller,* 243 Mich. 200, 219 N.W. 749 (1928).

Burton v. *Tuite,* 78 Mich. 363 (1889).

Bend Publishing Co. v. *Haner,* 118 Ore. 105, 244 Pac. 868 (1926).

Cordero v. *Prensa Insular de Puerto Rico,* 169 F. (2d) 229 (1948) (C.C.A. 1).

Hobart v. *Commissioner of Corporations & Taxation,* 311 Mass. 341, 349 (1942).

Siebert, The Rights and Privileges of the Press (1934), pp. 19, 20.

45 American Jurisprudence, p. 420.

c. The law of Rhode Island is that these records are public records to which persons in the position of these respondents clearly have the right of access.

In addition to the state of the record itself and in addition to the general principles and authorities applicable to this subject, we have in the case at bar an express and unreversed holding of a lower Rhode Island Court (the Superior Court) that the records here involved are public

records to which persons in the position of these respondents have the right of access. *Nolan* v. *McCoy,* M.P. No. 2806, Superior Court, R.I. (1949). Both the District Court and the Court of Appeals found that the law of Rhode Island was to this effect.

The matter had come up in the State Courts in this way: Some of the problems in the case at bar (exclusive of questions under the United States statutes) were the subject of litigation in the State Courts between virtually the same parties. This is the mandamus action referred to in the two opinions below. On 18 May, 1949, the Superior Court for the County of Providence, in the State of Rhode Island, held that these particular tax abatement records were public records. See *Nolan* v. *McCoy,* M.P. No. 2806, *supra.* The relevant part of the Superior Court's decision is set out in the District Court's opinion (Record, pp. 62-63). The Superior Court, after dealing with the general principles and authorities involved, held that "it is our opinion that the records in question are public records" (Record, p. 62).

The petitioners would have this Court believe that this decision was reversed by the Supreme Court of Rhode Island. It was not reversed. As the Court of Appeals has stated, the Supreme Court merely reversed "for procedural reasons on a motion to quash" (Record, p. 656). The paragraph of the opinion of the Supreme Court of Rhode Island which left the matter fully open is quoted in the opinion of the Court of Appeals (Record, pp. 656-657).

The petitioners contend that an earlier opinion—*In re Caswell,* 18 R.I. 835 (1893)—is applicable here. Both of the Courts below dealt with the *Caswell* case. The Court of Appeals said (Record, p. 657):

> "Judicial records, such as the court was considering in *In re Caswell's Request* referred to above, stand on a different basis from the fiscal records of a municipal

corporation. Traditionally, courts have exercised the power to impound their records when circumstances warranted such action, but we are not aware of any comparable power of municipal officials with respect to the fiscal records of their municipality. Indeed the existence of such a power would be quite at variance with democratic principles as developed in this country. Thus we take the restrictive language used in *In re Caswell's Request* as intended to have application to judicial records, but not by any means as necessarily intended also to apply to the fiscal records of a municipality. This appears to be the construction put upon that language by the State Superior Court in the mandamus proceeding, and we see nothing in the opinion of the Supreme Court of Rhode Island in that proceeding to refute that construction."

(It might be noted parenthetically that the decision in *In re Caswell*—contained in an Appendix to volume 18 of the Rhode Island Reports—consists of advice to a Court clerk as to whether he should make available to a newspaper some "painful and sometimes disgusting" divorce depositions involving a party in a divorce proceeding who was a member of the bar. The Court advised the Clerk not to make the record available.)

Thus, as stated in the opinion of the Court of Appeals in the case at bar, the Superior Court decision in *Nolan* v. *McCoy* stands unreversed as the law of Rhode Island and therefore should be and in fact must be followed by the United States Courts.

Fidelity Union Trust Co. v. *Field,* 311 U.S. 169, 177-178 (1940).

West v. *American Tel. & Tel. Co.,* 311 U.S. 223, 236, 237 (1940).

We submit, therefore, that the contention of the petitioners that these records are not public records to which respondents have the right of access and were improperly held to be such public records by the two Courts below is utterly without merit. Moreover, in view of the painstaking analysis of the problem by the two lower Courts, it would appear that no question of such doubt or importance is involved as to warrant the granting by this Court of a writ of certiorari.

II. The Petitioners' Contention that the Providence Journal and its Representatives were Not Deprived of the Equal Protection of the Laws on Any "Matter of Right" is Without Merit, either as a Proposition of Law or as the Basis for an Application for Certiorari.

As stated under the heading "Questions Presented, etc." this second contention is really governed by the determination of the first question. Inasmuch as it is clear that these records were public records and that the Providence Journal and its representatives were arbitrarily refused access to them (while at the same time access to them was granted to a locally competing newspaper), then it follows that these respondents were denied the Constitutional safeguard of the "equal protection of the laws" and that their rights were infringed.

We respectfully refer this Court to the two opinions below. Important and conclusively persuasive portions of the opinion of the Court of Appeals on this point are as follows (Record, pp. 655, 658):

> "Thus under the Constitution of the United States all persons within the jurisdiction of a State are entitled as of right to the equal protection of its laws,

(*Truax* v. *Raich*, 239 U.S. 33 (1915)) and Congress has implemented that right, first by providing a cause of action for its enforcement, and second by giving the district courts original jurisdiction of that cause of action.

"The question then is whether the plaintiffs are persons within the jurisdiction of the State who have been denied by the State the equal protection of its laws. Obviously the individual plaintiffs, and also the corporate plaintiff, are 'persons' within the jurisdiction of the State of Rhode Island. *Grosjean* v. *American Press Co., Inc.*, 297 U.S. 233, 244 (1936), and cases cited. And it is well settled that municipal ordinances and the actions in office of municipal officials constitute state action and are within the prohibition of the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Lovell* v. *Griffin*, 303 U.S. 444, 450 (1938). . . .

"Hence for present purposes it is established that the records with which we are concerned are 'public records', and as such the individual plaintiffs, if not as members of the general public at least as citizens of Rhode Island, and the corporate plaintiff as a local tax payer, are entitled under state law to inspect those records.* And clearly the refusal of the defendants to accord the plaintiffs their right of inspection while granting such right to a competitor, the Pawtucket Times, constitutes a denial of equal protection of the laws which gives rise to a case or controversy within federal jurisdiction under the statutes quoted earlier in this opinion."

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*"It is not disputed that if the plaintiffs have the right of inspection they also have the right of publication."

III. The Form of the Complaint Presents No Issue for This Court.

The District Court denied the motion with regard to this (Record, p. 64). The Court of Appeals took similar action (Record, pp. 658-659).

See Federal Rules of Civil Procedure, Rule 61.

Conclusion.

The present petition thus discloses no reason for disturbing the judgment of the Court of Appeals affirming the judgment of the District Court and no such special or important reason as to justify the granting of certiorari. We ask, therefore, that the petition be denied.

Respectfully submitted,

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November, 1951.